IN THE

Supreme Court of Missouri

No. SC92978

JOHN ROE,
Appellant,

v.

COLONEL RON REPLOGLE, et al.,
Respondents.

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Peggy Stevens McGraw, Circuit Judge

APPELLANT'S REPLY BRIEF

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I. CONGRESS NEITHER CLEARLY DELINEATED THE POLICY OR STANDARD AND THE SCOPE OF THE AUTHORITY NOR PROVIDED MEANINGFUL CONSTRAINT

When Congress delegates authority it must "clearly delineate[ ] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)) (alteration in *Mistretta*). On this much, Appellant and Respondents agree. However, Appellant takes issue with Respondents' argument, Respondents' Brief at 6-7, that Congress clearly designated "the general policy" for the Attorney General to follow by enacting a comprehensive, national system for registration of sex offenders, and that "comprehensive" and "national" necessarily includes retroactive application of SORNA to pre-Act offenders. It does not. If Congress had wanted to say that the Act was to be "to the extent possible, retroactive", Respondents' Brief at 7, it could have said that in its direction to the Attorney General to decide the matter. It did not do so. In fact, as noted in Appellant's Brief at 26, Congress provided *no* policy to guide the Attorney General as to retroactivity of the Act. And, as set forth in Appellant's Brief at 31, Judge Raggi has explained that the mere existence

of a statutory purpose to create a comprehensive national system for registration falls short of considering what factors, if any, might counsel against applying SORNA to pre-Act offenders.

And, irrespective of whether the general policy to create a comprehensive, national system for registration provides a sufficient general policy for the Attorney General to keep in mind while determining the application of SORNA to pre-Act offenders, Congress' delegation of authority must delineate (a) a clear delineation of the general policy; (b) the public agency to apply it; *and*, (c) the boundaries of the delegated authority. *Mistretta*, 488 U.S. at 372-73. All three prongs of the test must be met. Congress must have provided guidance to confine the discretion of the authority – the Attorney General – to whom it delegated power. While Respondents are quick to point at what they interpret to be a general policy sufficient to guide the Attorney General (the agency), they point to absolutely no boundaries providing guidance that would confine the discretion that Congress granted the Attorney General.

Nor could Respondents have done so. As observed in Appellant's Brief at 26-28, 31-33, Congress provided no guidance whatsoever as to whether (and for how long) all individuals convicted of all sex offenses prior to the Act should be subject to SORNA. Should the remoteness or severity of the offense matter? Should it matter that litigants – like Roe – were advised to plead guilty rather than

defend charges to "save" victims from having to testify; then were granted a suspended imposition of sentence under Missouri law; later successfully complied with terms of probation and completed it; all after having been advised that this would "end" their involvement in the criminal justice system? Should fairness matter? Should all sex offenders be regarded equally, without any assessment of their propensity to offend again, irrespective of whether they have been through any sort of training?[1] There is nothing in the Act to provide such guidance. Absent that guidance, the delegation to the Attorney General does not pass muster, especially since the Supreme Court has suggested that greater specificity of boundaries is required in the criminal context. And, here, without any meaningful guidance, the officer charged with enforcement of the criminal sanctions for failing to abide by SORNA was given the legislative power to pronounce the scope of a law with criminal consequences. This delegation of legislative power does not withstand scrutiny under the Supreme Court's test.

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[1]To do so certainly gives short shrift to efforts and efficacy of corrections programs. It also renders ineffective a list, such as Missouri's, which draws no distinctions whatsoever. Missouri's sex offender registry is essentially worthless when it comes to giving citizens any indicia as to whether an offender is presently dangerous or is likely to commit another sex offense.

II. THE SUPREME COURT HAS HELD THAT THERE WAS A DELEGATION OF AUTHORITY TO THE ATTORNEY GENERAL

Respondents claim that Appellant's reliance on Justice Scalia's dissent in *Reynolds v. United States*, 565 U.S. ___, 132 S.Ct. 1043 (2012), is misplaced because he would have held that SORNA did not delegate to the Attorney General any discretion to make the act retroactive. That may be so, but the majority of the *Reynolds* Court *did* hold that Congress *had* delegated such authority to the Attorney General in 42 U.S.C. § 16913 (d). That being the case, Justice Scalia's rejection of any delegation of legislative authority does not bode well for the constitutionality of Congress delegating the determination of the application of SORNA to pre-Act sex offenders. And, Justice Scalia's doubts about SORNA's constitutionality involve more than his concern with whether Congress can constitutionally leave it to the Attorney General to decide the applicability of a criminal statute. He also recognized that Congress provided "no statutory standard whatever governing [the Attorney General's] discretion". *Reynolds*, 132 S.Ct. at 986 (Scalia, J., dissenting). Thus, in this instance, while there may be an intelligible policy, and there may have been an identification of the agency which was to exercise the power, there are no boundaries to this delegated authority and Congress provided no guidance to confine the discretion of the Attorney General.

Therefore, Appellant's reliance is not misplaced. To the contrary, Justice Scalia's "musings", Respondents' Brief at 9 n. 4, may portend an eventual holding that the delegation of power to the Attorney General was unconstitutional and invalidate his determination that the Act applies to pre-Act offenders.

III. THE UNITED STATES SUPREME COURT HAS NOT FORECLOSED A SUBSTANTIVE DUE PROCESS CHALLENGE TO SORNA

Respondent asserts, Respondents' Brief at 16, that the due process issue is "well-settled" adversely to Roe's claim, citing *Doe v. Phillips*, 194 S.W.3d 833, 845 (2006). However, *Doe v. Phillips* dealt only with SORA, not with SORNA.

When presented with a due process claim in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), which was pressed as a *procedural* due process claim, *id*. at 8, a majority of the justices on the United States Supreme Court recognized that the sex offender registration and dissemination provisions of Connecticut's Megan's law might be analyzed in terms of a substantive due process claim if it could be shown that a fundamental liberty interest was implicated by the law. [2] The Court did not reach the question of whether the

[2] Justice Souter (joined by Justice Ginsburg) not only agreed with the majority's observation that the decision did not foreclose a claim that the dissemination of registry information was actionable on a substantive due process

offender had been deprived of liberty interest because the hearing he sought by his procedural due process challenge would have been irrelevant under Connecticut's statutory scheme. *Id*. at 7 (due process does not require a hearing to establish a fact that is not material under the Connecticut statute).

Then, as recently as April 17, 2013, in the argument in *United States v. Kebodeaux*, 687 F.3d 232 (5th Cir. 2012), *cert granted*, ___ U.S. ___, 133 S.Ct. 928 (Jan. 11, 2013) (Case No. 12-418), Justice Breyer, exploring the boundaries of the Article I authority of Congress to enact SORNA mused with counsel that "somehow I have to get out of my mind the *ex post facto* part, the potential violation of due process part . . .." Oral Argument, April 17, 2013 (visited April 30, 2013) <http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-418-ev39.pdf> at 30. Together with Justices Scalia, Alito, Sotomayor, Kagan, and the Chief Justice, all actively questioning the constitutional source of the

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principle to the extent that libel might be at least a component of such a claim. He also opined that the line drawn by the legislature between offenders who are considered eligible to seek discretionary relief from the courts and those who are not is, "like all legislative choices affecting individual rights, open to challenge under the Equal Protection Clause." *Connecticut Department of Public Safety*, 538 U.S. at 10 (Souter, J., concurring).

congressional authority to impose SORNA obligations on persons not connected to the federal government, Justice Breyer's statement seems to be more than just musing. The foundation of SORNA's federal registration requirement, upon which Roe's obligation to register in Missouri has been constructed, appears at least to be in grave doubt.

CONCLUSION

This Court need not and should not wait on the Supreme Court to reach the conclusion that Congress' grant of authority to the Attorney General to determine the applicability of SORNA to pre-Act offenders such as Roe violates the nondelegation doctrine and to require him to register under SORNA is unconstitutional. This Court should decide the federal constitutional issue this Missourian presents. And, this Court should conclude that because Roe has no valid obligation to register under federal law, he is not required to register under SORA.

For these reasons, and for the reasons set forth in Appellant's Brief, this Court should reverse the trial court's grant of summary judgment and remand for issuance of a declaration that Roe is exempt from registration under both SORNA and SORA and enjoin any prosecution for not having registered.

Respectfully submitted,

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May 7, 2013

IN THE MISSOURI SUPREME COURT

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	)	
Appellant,	)	
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v.	)	Case No. SC92978
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	)	
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type and volume limitations of MO. SUP. CT. R. 84.06(b). It contains no more than 7,750 words of text, *i.e.*, no more than twenty-five percent (25%) of 31,000 words (specifically, containing 1,538 words). It was prepared using Word Perfect X4 for Windows and converted to portable document format. I further certify that the original was signed by attorney for the appellant and this brief is otherwise in accordance with MO. SUP. CT. R. 55.03.

By s/ Jamie Kathryn Lansford
Attorney for Appellants

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	)	
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2013, the above Appellant's Reply Brief was filed with the Court via the Court's electronic filing system and a copy was served via the same system on counsel listed below:

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